A

AMBANK (M) BHD

v.

MERIDIAN GARDENS SDN BHD

B

HIGH COURT MALAYA, JOHOR BAHRU
VERNON ONG LAM KIAT JC
[ORIGINATING SUMMONS NO: (MT1) 24-2225-2005]
20 MAY 2008

C ***LAND LAW:*** *Charge - Order for sale - Application for - Whether there was non compliance of O. 83 r. 3 of the Rules of the High Court 1980 - Whether there was failure to comply with the mandatory requirements of s. 257 National Land Code - Whether chargor adduced facts establishing cause to the contrary*

D This was an originating summons ('the OS') filed by the plaintiff for an order for sale of a piece of land to be sold by public auction pursuant to s. 256 National Land Code and O. 83 Rules of the High Court 1980. The plaintiff had approved and granted various credit facilities to the defendant which included an E overdraft facility, term loan facility and bridging loan for a total sum of RM8,500,000. In consideration of and as security for the repayment of the granting of the said facilities the defendant created the charge over the land in favour of the plaintiff. By a letter dated 20 September 2004 the plaintiff through its solicitors F demanded the repayment of the outstanding sum of RM623,008.82 under the overdraft facilities and RM6,642,076.86 under the term loan facilities. Subsequently on 15 April 2005, the plaintiff's solicitors issued a statutory notice of default in Form 16D of the National Land Code demanding the outstanding G amounts. The defendant, in opposing the OS, submitted that there was non-compliance of O. 83 Rules of the High Court 1980 and raised the issues that (a) there was uncertainty in the interest on term loan facility; (b) absence of particulars as to repayments towards account of the term loan facility (c) uncertainty of the H amounts owed as at the date of the order for sale; (d) interest as at the date of the affidavit was not stated.

Held (dismissing plaintiff's originating summons):

I **(1)** In two of the plaintiff's affidavits (encls. 11 and 12) the arrears as at the date of the OS was stated as RM1,780,515.20. However, in the plaintiff's subsequent

affidavit (encl.19) the arrears was stated to be RM2,111,225.38. As the date of the OS was one and the same, it followed that the arrears of interest as at the date of the OS must be the same. The discrepancy of RM330,710.18 was a substantial amount. It had not been explained by the plaintiff despite being challenged on it by the defendant. The ambiguities and uncertainties in the figures were evident so as to constitute a failure on the part of the plaintiff to comply with the strict and mandatory requirements of O. 83 r. 3(3) of the RHC and s. 257(1)(c) of the NLC. (paras 14 & 17))

(2) There had been a repayment towards the facility in the form of servicing interest and which particulars were not provided by the plaintiff in breach of O. 83 r. 3(3) RHC. In this regard, it was the court's finding that the particulars as to the repayment of the interest towards the term loan facility had not been furnished and that this omission had prejudiced the defendant. This serious omission to provide the said particulars of repayment constituted a breach of the mandatory requirements of O. 83 r. 3(3) RHC. (para 22)

(3) No statement of account had been produced by the plaintiff to show the amounts paid towards the overdraft. The plaintiff's affidavits merely stated 'tidak terpakai' under the particulars of repayments for the overdraft. This uncertainty as to the amounts owed as at the date of the order for sale was in non-compliance with rr. 3(3)(d) and (6) of O. 83 RHC. Read together with s. 257(d) NLC, it was the court's finding that the plaintiff had failed to comply with the mandatory requirements of O. 83 r. 3(3)(d), (6) and s. 257 NLC. (para 29)

(4) The interest in arrear as stated in the plaintiff's affidavit (9) as was at (i) the date of the OS and (ii) 23 July 2007. The date 23 July 2007 was not in fact the date of the affidavit in question. The plaintiff's failure to provide the interest in arrear as at the date of the plaintif's affidavit was in breach of the mandatory requirement of O. 83 r. 3(3)(c) RHC. (para 31)

(5) The chargor had adduced facts that establish cause to the contrary in the sense as laid down by the Federal Court in *Low Lee Lian.* (para 34)

Case(s) referred to:

Bank Pertanian Malaysia v. Zainal Abidin Kassim & Anor [1995] 1 LNS 33 ***(refd)***

Citibank NA v. Ibrahim Othman [1993] 1 LNS 104 HC ***(refd)***

Diamond Peak Sdn Bhd v. United Merchant Finance Bhd [2003] 2 CLJ 8 CA ***(refd)***

Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 SC ***(refd)***

Overseas Union Bank (M) Bhd v. L & L Properties Sdn Bhd [1999] 3 CLJ 47 HC ***(refd)***

Perwira Habib Bank Malaysia Bhd v. Lum Choon Realty Sdn Bhd [2005] 4 CLJ 345 FC ***(refd)***

Legislation referred to:

National Land Code, ss. 256(3), 257(1)(c), (d)

Rules of the High Court 1980, O. 83 r. 3(1), (3)(b), (c), (d), (6), (7)

For the plaintiff - Abdullah Omar; M/s Hisham, Sobri & Kadir

For the defendant - JD Goonting; M/s ML Lum & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Vernon Ong Lam Kiat JC:

[1] This is an originating summons ('the OS') filed by the plaintiff for an order for sale of a piece of land held under H.S. (D) 274354 PTD 148637 Mukim Plentong Johor D.T. ('the land') to be sold by public auction pursuant to s. 256 National Land Code and O. 83 Rules of the High Court 1980.

Background Facts

[2] Pursuant to the plaintiff's letter of offer dated 18 January 2001 and which terms and conditions were subsequently varied in the plaintiff's letters dated 23 January 2001 and 2 April 2001, the plaintiff approved and granted various credit facilities to the defendant which included an overdraft facility, term loan facility and bridging loan for a total sum of RM8,500,000. In consideration of and as security for the repayment of the granting of the said facilities the defendant created the charge over the land in favour of the plaintiff. By a letter dated 20 September 2004 the plaintiff through its solicitors demanded the repayment of the outstanding sum of RM623,008.82 under the overdraft facilities and RM6,642,076.86 under the term loan facilities as at 31 August

2004. Subsequently on 15 April 2005 the plaintiff's solicitors issued a statutory notice of default in Form 16D of the National Land Code ('NLC') demanding the outstanding amounts as at 31 March 2005. The said form is reproduced hereunder:

KANUN TANAH NEGARA

BORANG 16d

(Seksyen 254)

NOTIS KEMUNGKIRAN BERKENAAN DENGAN GADAIAN

Kepada MERIDIAN GARDENS SDN BHD (509864-T) yang beralamat di No. 28, Jalan Tun Abdul Razak (Susur 1), 80000 Johor Bahru, Johor Darul Takzim atau di Suite 7.05, Tingkat 7, Wisma Central, Jalan Ampang, 50450 Kuala Lumpur, penggadai dalam gadaian yang tersebut dalam jadual di bawah ini bagi tanah yang tersebut di dalamnya.

Bahawasanya tuan telah melanggar peruntukan-peruntukan gadaian ini dengan jalan:

Kegagalan atau keengganan untuk membayar balik kemudahan obederaf berjumlah RM500,000.00 (Ringgit Malaysia: Lima Ratus Ribu sahaja) dan pinjaman penggal berjumlah RM5,000,000.00 (Ringgit Malaysia: Lima Juta Sahaja) yang diambil dari AmBank Berhad (dahulunya dikenali sebagai Arab-Malaysian Bank Berhad). Baki yang tertunggak setakat 31.3.2005 di bawah kemudahan-kemudahan tersebut adalah seperti berikut:

(a) di bawah kemudahan obederaf [No akaun: 007-0201-000100255-2]	–	sejumlah RM658,219.02 dengan faedah berterusan pada kadar 2.50% setahun ke atas kadar asas pinjaman Pemegang gadaian (yang mana pada 7.4.2005 ada 6% setahun) beserta faedah ingkar pada kadar 1 % ke atas kadar yang dinyatakan di atas dikira secara kompaun ke atas baki harian dari 1.4.2005 sehingga ke tarikh penyelesaian sepenuhnya.
(b) di bawah kemudahan Pinjaman Penggal [No akaun: 00741001195]	–	sejumlah RM7,019,049.40 dengan faedah berterusan pada kadar 2.50% setahun ke atas kadar asas pinjaman pemegang gadaian (yang mana pada 7.4.2005 adalah 6% setahun) yang dikira secara kompaun ke atas baki bulanan dari 1.4.2005 sehingga ke tarikh penyelesaian sepenuhnya.

A Bahawasanya kemungkiran tersebut telah berterusan bagi tempoh tidak kurang dari tujuh (7) hari sebelum tarikh notis ini, kami, sebagai pemegang gadaian, menurut kuasa yang diberi oleh Seksyen 254, Kanun Tanah Negara, dengan ini menghendaki tuan supaya memulihkan peruntukan yang dilanggar itu dalam tempoh tujuh (7) hari dari tarikh notis ini disampaikan.

B

Dan lagi adalah diberi notis bahawa jika sekiranya tuan tidak memulihkan peruntukan yang dilanggar itu dalam tempoh itu, maka kami akan memohon supaya Perintah Jual dikeluarkan ke atas tanah yang digadaikan.

C BERTARIKH PADA 15 HARIBULAN APRIL 2005

tt
PEGUAMCARA BAGI PIHAK
PEMEGANG GADAIAN

D **[3]** The following affidavits were filed in connection with the hearing of the OS:

Plaintiff's affidavit (1) affirmed on 13 July 2005	...	encl. 3
E Defendant's affidavit (1) affirmed on 6 September 2005	...	encl. 7
Plaintiff's affidavit (2) affirmed on 24 October 2005	...	encl. 8
Defendant's affidavit (2) affirmed on 25 November 2005	...	encl. 9
F Plaintiff's affidavit (3) affirmed on 13 December 2005	...	encl. 10
Plaintiff's affidavit (4) affirmed on 22 March 2006	...	encl. 11
Plaintiff's affidavit (5) affirmed on 25 July 2006	...	encl. 12
G Defendant's affidavit (3) affirmed on 11 August 2006	...	encl. 22
Plaintiff's affidavit (6) affirmed on 9 January 2007	...	encl. 19
Defendant's affidavit (4) affirmed on 16 January 2007	...	encl. 18
H Plaintiff's affidavit (7) affirmed on 25 June 2007	...	encl.19A
Defendant's affidavit (5) affirmed on 31 July 2007	...	encl. 23
Plaintiff's affidavit (8) affirmed on 17 September 2007	...	encl. 26

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Defendant's affidavit (6) affirmed on 21 September 2007	...	encl. 24
Defendant's affidavit (7) affirmed on 1 October 2007	...	encl. 25
Plaintiff's affidavit (9) affirmed on 26 October 2007	...	encl. 27
Defendant's affidavit (8) affirmed on 7 November 2007	...	encl. 27A
Plaintiff's affidavit (10) affirmed on 2 January 2008	...	encl. 28
Defendant's affidavit (9) affirmed on 4 January 2008	...	encl. 29
Plaintiff's affidavit (11) affirmed on 18 February 2008	...	encl. 28A
Defendant's affidavit (10) affirmed on 27 February 2008	...	encl. 29A
Plaintiff's affidavit (12) affirmed on 17 March 2008	...	encl. 30
Defendant's affidavit (11) affirmed on 19 March 2008	...	encl. 30A

[4] The principles governing the hearing of a challenge against the enforcement of a chargor's rights under s. 256 NLC has been clearly enunciated by the Federal Court in *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36. It is worthwhile revisiting this landmark decision. In *Low Lee Lian* the appellant charged his land to the respondent bank as security for a loan granted by the respondent bank to a third party. When the third party defaulted in the repayment of the loan the respondent bank applied to enforce the statutory charge by way of an order for sale. The appellant resisted the respondent bank's application but the judge directed the sale of the land by public auction. The appellant appealed against the order. The appellant argued that the judge was wrong in granting the order for sale. It was argued that (i) the respondent bank had varied the interest rate without giving any notice to the appellant and (ii) the respondent bank had, without the appellant's knowledge, permitted the third party to breach the terms of the agreement between them. The principal issue for the determination of the Federal Court was whether, even if the complaints by the appellants were made out, they constituted sufficient reason for the refusal of an order for sale by establishing 'cause to the contrary' under s. 256(3) NLC. The

A Federal Court held that the issue for determination is essentially a question of law depending on the interpretation of s. 256(3) NLC.

[5] Section 256 NLC provides as follows:

B 256(1) This section applies to land held under:

(a) registry title;

(b) the form of qualified title corresponding to registry title; or

C (c) subsidiary title,

and to the whole of any divided share in, or any lease of, any such land.

(2) Any application for an order for sale under this Chapter D by a chargee of any such land or lease shall be made to the court in accordance with the provisions in that behalf of any law for the time being in force relating to civil procedure.

(3) On any such application, the court shall order the sale of the land or lease to which the charge relates unless it is satisfied E of the existence of cause to the contrary.

[6] Speaking for the Federal Court Gopal Sri Ram JCA said:

In our judgment, 'cause to the contrary' within 256(3) may be established only in three categories of cases. F

First, it may be taken as settled that a chargor who is able to bring his case within any of the exceptions to the indefeasibility doctrine housed in s. 340 of the Code establishes cause to the contrary. That section provides as follows:

G 340(1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.

H (2) The title or interest of any such person or body shall not be indefeasible:

(a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or

I (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or

(c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

(3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-s (2):

(a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and

(b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:

Provided that nothing in this subsection shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

(4) Nothing in this section shall prejudice or prevent:-

(a) the exercise in respect of any land or interest of any power of forfeiture or sale conferred by this Act or any other written law for the time being in force, or any power of avoidance conferred by any such law; or

(b) the determination of any title or interest by operation of law.

In other words, a chargor who is able to demonstrate that the charge, the enforcement of which is sought, is defeasible upon one or more of the grounds specified under sub-ss (2) and (4)(b) above will be held to have established cause to the contrary under s. 256(3). The decision of Smith J in *Subchent Kaur v. Chai Sau Kian* [1957] 1 LNS 81, of the former Federal Court in *Phuman Singh v. Kho Kwang Choon* [1965] 1 LNS 132, of Raja Azlan Shah J (as he then was) in *Overseas Union Finance Ltd v. Lim Joo Chong* [1971] 1 LNS 101 and that of Edgar Joseph Jr J (as he then was) in *United Malayan Banking Corporation Bhd v. Syarikat Perumahan Luas Sdn Bhd* [1988] 3 MLJ 352 (affirmed on appeal) sufficiently illustrate the proposition now under discussion.

Secondly, a chargor may show cause to the contrary within s. 256(3) of the Code by demonstrating that the chargee has failed to meet the conditions precedent for the making of an application for an order for sale. For example, failure on the part

of the chargee to prove the making of a demand or service upon the charger of a notice in Form 16D would constitute cause to the contrary. So too, where the notice demands sums not lawfully due from the chargee. See *Co-operative Central Bank Ltd v. Meng Kuang Properties Bhd* [1991] 2 MLJ 283. However, in such a case, it would be open to the chargee to subsequently serve a notice or a proper notice (as the case may be) before commencing proceedings afresh as the cause shown to the contrary does not in substance affect the chargee's right to apply for an order for sale.

Thirdly, a chargor may defeat an application for an order for sale by demonstrating that its grant would be contrary to some rule of law or equity. This principle finds its origins in the judgment of Aitken J in *Murugappa Chettiar v. Letchumanan Chettiar* [1938] 1 LNS 42 where he said:

> I agree that equitable principles should not be invoked too freely for the purpose of construing our Land Code, but surely a chargor, who shows that there would be no need to sell his land if the chargee paid up in full what is due from himself in another capacity, has shown good and sufficient cause why the land should not be sold. Section 149 of the Land Code obviously contemplates that there may be cases in which charged land should not be sold, even though there has been a default in payment of the principal sum or interest thereon secured by the charge; and it seems to me that a chargor may 'shew cause' either in law or equity against an application for an order for sale, and that the courts should refuse to make an order in every case where it would be unjust to do so. By 'unjust' I mean contrary to those rules of the common law and equity which are in force in the Federated Malay States.

In *Murugappa Chettiar (ibid)*, the appellant was one of two co-proprietors of land. The proprietors jointly charged the land to the respondent as security for a loan. The chargee commenced proceedings under s. 149 of the Land Code (Cap 138), the precursor to s. 256(3), which read as follows:

> After such default in payment or observance continuing for the space of one month from the service of such notice or for such other period as may in such instrument be for that purpose limited, it shall be lawful for the chargee, by summons, to call the proprietor of the charged land before the court to shew cause why the land subject to the charge should not be sold by public auction under direction of the court. If no cause be shewn to the satisfaction of the court,

> it shall order the public sale of land to take place at such place and time as shall appear most suitable, but not less than four weeks from the date of the order, and it shall be the duty of the registrar of the court to see that such sale is publicly notified during these four weeks in such manner as may be usually adopted for such notifications for the time being, or as shall be regulated by any rules of court in that behalf.

The appellant alleged that he was liable for only half the loan amount and that he had made part payment of that sum. He paid the balance due from him into court and alleged that the other charger who was liable for the remaining half was the nominee of the respondent chargee. All these allegations were not denied by the respondent chargee. The judge at first instance granted an order for sale without investigating any of these allegations. The FMS Court of Appeal held that there ought to have been an investigation into the unrefuted allegations, allowed the appeal and remitted the matter to the judge for trial of the issues. It was in this context that the remarks by Aitken J in the FMS Court of Appeal in the passage earlier quoted were uttered.

In *Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd & Anor* [1989] 1 CLJ (Rep) 1, the Privy Council, while acknowledging the existence of the proposition, limited its operation in the following terms:

> Section 256(3) of the National Land Code is mandatory. The court 'shall' order a sale unless it is satisfied of the existence of 'cause to the contrary'. Granted that these words have been construed in Malaysia as justifying the withholding of an order where to make one would be contrary to some rule of law or equity, they clearly cannot extend to enabling the court to refuse relief simply because it feels sorry for the borrower or because it regards the lender as arrogant, boorish or unmannerly.

In a later passage, after reproducing s. 340 of the Code, Lord Oliver of Aylmerton who delivered the opinion of the Board said:

> Even assuming – a point which does not arise in the instant case and has not been argued – that this section (ie, s. 340) might not protect a purchaser or chargee acquiring title with actual notice of the equitable interest of a purchaser, their Lordships are quite unable to see how the interest of a purchaser who has expressly consented to the creation of the chargee's interest could prevail over the registered title. Nor, in their Lordships' opinion, could it furnish a 'cause to the contrary' for the purposes of s. 256.

A It is thus clear that to fall within the scope of the principle in *Murugappa Chettiar*'s case, the chargor must be able to point to a statutory direction or some rule of the common law or doctrine of equity operating in his favour and against which an order for sale would militate. Anything that falls short of this requirement will not amount to cause to the contrary under s. 256(3). As was observed by Harun Hashim SCJ (*albeit* in another context) when delivering the judgment of the Supreme Court in *Buxton & Anor v. Supreme Finance (M) Bhd* [1992] 2 MLJ at p. 487:

> The issue as to the rights of an innocent purchaser for value, with or without notice of the charge as against a registered chargee has been considered by the courts and is now settled law: see eg, *Tai Lee Finance Co Sdn Bhd v. Official Assignee & Ors* [1983] 1 MLJ 81; *Perwira Habib Bank (M) Bhd v. Bank Bumiputra (M) Bhd* [1988] 3 MLJ 54; *Perwira Habib Bank (M) Bhd v. Oon Seng Development Sdn Bhd* [1990] 1 MLJ 47. In all these cases, it was held that the interest of a registered chargee is indefeasible by s. 340(1) of the Code unless it is made defeasible by s. 340(2). The indefeasibility of the chargee's interest is not affected by the chargor's conduct, however unconscionable or deceitful it may be, unless it can be shown that there was collusion between the chargor and the chargee to defeat the interest of a third party. The interest of a *bona fide* purchaser for value cannot prevail over that of a registered chargee.

Defendant's Submission

[7] Before me learned counsels for both parties tendered their respective written submissions. The following issues were raised by the defendant in opposing the OS.

Non Compliance Of O. 83 RHC 1980

[8] The first ground advanced by learned counsel for the defendant pertained to the correctness of the statutory particulars prescribed under O. 83 r. 3(3), (6) and (7) RHC 1980 read together with s. 257 NLC.

[9] Order 83 r. 3(3), (6) and (7) RHC 1980 reads as follows:

> (3) Where the plaintiff claims delivery of possession the affidavit must show the circumstances under which the right to possession arises and, except where the Court in any case or class otherwise directs, the state of the account between the chargor and chargee with particulars of:

(a) the amount of the advance;

(b) the amount of the repayments;

(c) the amount of any interest or instalments in arrear at the date of issue of the originating summons and at the date of the affidavit; and

(d) the amount remaining due under the charge.

(4) Where the plaintiff claims delivery of possession, the affidavit must give particulars of every person who to the best of the plaintiff's knowledge is in possession of the charged property.

(6) Where the plaintiff claims payment of moneys secured by the charge, the affidavit must prove that the money is due and payable and give the particulars mentioned in paragraph (3).

(7) Where the plaintiff's claim includes a claim for interest to judgment, the affidavit must state the amount of a day's interest.

[10] Section 257 NLC provides as follows:

257 (1) Every order for sale made by the Court under section 256 shall:

(a) provide for the sale to be by public auction;

(b) require the sale to be held on, or as soon as may be after, a date specified therein, being a date not less than one month after the date of which the order is made;

(c) specify the total amount due to the chargee at the date on which the order is made; and

(d) require the Registrar of the Court to fix a reserve price for the purpose of the sale, being a price equal to the estimated market value of the land or lease in question.

[11] Learned counsel for the defendant submitted that the requirement to comply with O. 83 r. 3(3) to (6) RHC 1980 is mandatory in nature. He relied upon the decision of the Federal Court in *Perwira Habib Bank Malaysia Bhd v. Lum Choon Realty Sdn Bhd* [2005] 4 CLJ 345 where it was held that the procedural requirements of O. 83 r. 3(1), (3), (6) and (7) RHC 1980 must

be complied with strictly for the purpose of seeking an enforcement of a charge registered under the NLC by way of an order for sale and that non-compliance with the said provisions would render an order for sale defective and liable to be set aside.

[12] It was submitted that the particulars provided by the plaintiff pursuant to O. 83 r. 3(3) are insufficient, *viz.*, (i) the particulars in respect of the term loan facility are uncertain as to the arrears in interest as at the date of the OS, (ii) is absent as to particulars as to repayments made by the defendant towards account of the term loan facility, and (iii) is uncertain as to the ultimate correctness of the amounts claimed by the plaintiff as at the date of the order for sale.

[13] It was submitted that the particulars in respect of the overdraft facility are uncertain as to the ultimate correctness of the amounts claimed by the plaintiff. Finally, it was submitted that in respect of the overdraft and term loan, the plaintiffs entitlement to charge interest computed on the Base Lending Rate at 6.5% per annum and 6.75% per annum respectively had not been proved.

(i) Uncertainty In The Interest On Term Loan Facility

[14] Learned counsel alluded to the discrepancy on the amount of interest in arrears as at the date of the OS stated by the plaintiff. In two of the plaintiffs affidavits (encls. 11 and 12) the arrears as at the date of the OS is stated as RM1,780,515.20. However, in the plaintiff's subsequent affidavit (encl. 19) the arrears is stated to be RM2,111,225.38. As the date of the OS is one and the same, it follows that the arrears of interest as at the date of the OS must be the same. The discrepancy of RM330,710.18 is a substantial amount. It has not been explained by the plaintiff despite being challenged on it by the defendant.

[15] In reply learned counsel for the plaintiff submitted that the plaintiff can provide the statutory particulars in its first affidavit or any subsequent affidavit. He cited *Affin-ACT Finance Berhad v. Seremban Gold Resort Berhad* [2005 – unreported] where the High Court in Seremban expressly rejected the approach in *Citibank NA v. Ibrahim bin Othman*. It was submitted that the discrepancies raised by the defendant have been explained in the plaintiff's affidavit (9) (encl. 27).

[16] In *Citibank NA v. Ibrahim bin Othman* [1993] 1 LNS 104, the plaintiff chargee failed to provide the amount of the advance and the rate at which interest had been calculated. The High Court held that (i) it was incumbent on the plaintiff to provide the statutory particulars in the first affidavit. The plaintiff had failed to do so and the subsequent affidavits filed before the final hearing also did nothing to remedy the earlier inadequacies as the affidavits did not correctly state the amount of the advance nor show at what rate interest had been calculated; and (ii) the objective of O. 83 r. 3 is to enable the defendant to know at least by the date the originating summons is filed, what is the exact sum he is legally liable to pay so that he can make up his mind to contest or pay up. If there is a dispute as to the amount payable, the court must be able to say precisely when making its order 'the total amount due to the chargee at the date on which the order is made'. These words are from s. 257(1)(c) of the National Land Code 1965 and they are mandatory.

[17] After scrutinising the plaintiff's affidavits, it is plain that the ambiguities and uncertainties in the figures are evident so as to constitute a failure on the part of the plaintiff to comply with the strict and mandatory requirements of O. 83 r. 3(3) and s. 257(1)(c) NLC.

(ii) Absence Of Particulars As To Repayments Towards Account Of The Term Loan Facility

[18] Learned counsel for the defendant submitted that it is incumbent upon the plaintiff to furnish the amount of the repayments as provided in O. 83 r. 3(3)(b) RHC. According to the particulars provided by the plaintiff, the amount of repayments in regard to the overdraft facility is expressed to be 'not applicable' whilst in regard to the term loan the expression 'nil' is used. (paras 3(ii)(b), (c) encl. 11, paras 3(ii)(a) and (b) encl.12, and paras 4(ii)(a) and (b) encl. 19)

[19] In this regard learned counsel referred to the defendant's letter to the plaintiff (exh. KKW1 of the plaintiff's affidavit (encl. 19). He submitted that as at May 2001 there had been a full drawdown of the overdraft limit of RM500,000. The contents of the said letter are as follows:

Re: Meridian Gardens Sdn Bhd

Drawdown of RM500,000-00 from Overdraft Facility

Further to our discussion with your goodself, we would appreciate if you could allow us to drawdown the RM500,000-00 in the following matter

	M	RM
1. To pay towards the interest due on 1/5/2001		108,523-03
2. To place under a Fixed Deposit Account For subsequent interest serving	111,476-97	220,000-00
3. To drawdown the balance into our current Account no: 007-0201-100255-2		280,000-00
		500,000-00

[20] Learned counsel submitted that under item 2 of the said letter RM111,476.97 was expressly appropriated towards serving interest for the term loan. This constituted repayment of the term loan. The non-disclosure of this material fact by the plaintiff is in breach of O. 83 r. 3(3)(b) RHC 1980. In *Overseas Union Bank (M) Bhd v. L & L Properties Sdn Bhd* [1999] 3 CLJ 47 the chargee failed to disclose the repayments. The High Court held that the omission and non-compliance with O. 83 r. 3 were such as to be prejudicial to the chargor in that the court could not with confidence say precisely what 'the total amount due to the chargee at the date on which the order is made' and dismissed the chargor's application.

[21] Learned counsel further relied on *Bank Pertanian Malaysia v. Zainal Abidin bin Kassim & Anor* [1995] 1 LNS 33 where a failure by the chargee to state the amounts of repayments and instalments in arrear in non-compliance of O. 83 r. 3(3) and (6) RHC 1980 were serious omissions which warranted a dismissal of the action. The absence of such pertinent information was highly prejudicial to the chargor. Mohd Hishamudin J also said:

> In my opinion, the failure to comply with rr. 3(6) and 3(3), in particular, the failure to state:
>
> (a) the amount of the repayments; and
>
> (b) the amount of instalments in arrear,

are serious omissions which warrant a dismissal of the action; for the absence of such pertinent information is highly prejudicial to the defendants. Especially so in the present case where, in view of the fact that the amount owing is alleged in the affidavit in encl. 2 (RM48,766.52) is much lower than the amount of the loan (RM60,000), it is fair to infer that some repayments must have been made by the defendants. Fairness requires the chargee not only to state in the affidavit but also to state accurately the amount of repayments made and the amount of installments in arrear. It hardly needs to be reiterated here that the purpose of the rule is to protect the interest of the debtor/chargor.

[22] In reply learned counsel for the plaintiff argued that the defendant's argument is based on the assumption that there is repayment of the overdue interest under the term loan facility from the credit available in the overdraft facility. Learned counsel for the defendant argued that at the material time, however, the only facilities that were made available and drawn down by the defendant were the term loan and overdraft. At the time the defendant's instructions were given the repayment of interest could only have referred to the term loan facility as the overdraft facility had yet to be drawn down. Thus, it was submitted that there had been a repayment towards the facility in the form of servicing interest and which particulars were not provided by the plaintiff in breach of O. 83 r. 3(3) RHC. In this regard, it is the court's finding that the particulars as to the repayment of the interest towards the term loan facility has not been furnished and that this omission has prejudiced the defendant. This serious omission to provide the said particulars of repayment constitutes a breach of the mandatory requirements of O. 83 r. 3(3) RHC.

(iii) Uncertainty Of The Amounts Owed As At The Date Of The Order For Sale

[23] The OS came up for hearing on three previous occasions, namely on 28 March 2006, 17 August 2006 and 25 January 2007. As required by O. 83 r. 3(3) and (6) and s. 257(1)(c) NLC the plaintiff filed three affidavits (encl. nos. 11, 12 and 19) containing the prescribed particulars. Learned counsel for the defendant submitted that upon examining the prescribed particulars contained in the said affidavits it is evident there are discrepancies and uncertainties in the amount alleged as owing at the hearing dates.

[24] In the plaintiff's affidavit (encl. 11) the arrears in interest on the overdraft and term loan as at 28 March 2006 is RM100,650.53 and RM2,277,451.09 respectively. Learned counsel for the defendant argued that as at 28 March 2006, (a) the aggregate of the amount owing for the overdraft ought to be RM500,000 + RM100,650.53 = RM600,650.53 and (b) the aggregate of the amount owing for the term loan ought to be RM5,000,000 + RM2,2777,451.09 = RM7,277,451.09. Yet, inexplicably, at para 3(iv) of the said affidavit the amount outstanding stated for the overdraft is RM723,689.35 and for the term loan is RM7,720,086.07. The discrepancies between the two amounts owing for the overdraft is RM123,038.82 and the term loan is RM442,634.98.

[25] In the plaintiff's affidavit (encl. 12) the arrears in interest on the overdraft and term loan as at 17 July 2006 is RM129,799.69 and RM2,586,276.12 respectively. Applying the approach in the preceding paragraph, the discrepancies between the two amounts owing for the overdraft and the term loan are RM123,038.82 and RM442,634.98 respectively.

[26] And in the plaintiffs affidavit (encl. 19) the arrears in interest on the overdraft and term loan as at 25 January 2007 are RM164,463.48 and RM3,268,467.86 respectively. Applying the aforesaid approach, the discrepancies between the two amounts owing for the overdraft is RM123,038.82.

[27] Learned counsel further submitted that the plaintiff's supplementary affidavits, *viz*., plaintiff's affidavits (7), (8), (9) suffer from similar discrepancies between the amounts owing for the term loan and the overdraft. He argued that by reason of the said discrepancies the statutory particulars provided by the plaintiff are inconsistent, ambiguous and uncertain and fails to be proper for the purposes of s. 257(1)(c) NLC.

[28] In reply learned counsel for the plaintiff explained that (i) an overdraft facility has no fixed principal amount as an overdraft may be operated within its limit. Therefore, he submitted that the principal amount varies from time to time and interest is only imposed on the principal limit; and (ii) as default interest is imposed on all amounts in excess of the principal limit, thus the character of an overdraft is such that the aggregate of the interest

in arrears and the principal limit will not tally with the amounts said to be outstanding as at the date of the hearing, (plaintiff's affidavit encl. 19).

[29] In this regard, however, no statement of account has been produced by the plaintiff to show the amounts paid towards the overdraft. The plaintiff's affidavits merely stated "tidak terpakai" under the particulars of repayments for the overdraft. This uncertainty as to the amounts owed as at the date of the order for sale is in non-compliance with rr. 3(3)(d) and (6) of O. 83. Read together with s. 257(d) NLC, it is the court's finding that the plaintiff has failed to comply with the mandatory requirements of O. 83 r. 3(3)(d), (6) and s. 257 NLC.

Interest As At The Date Of The Affidavit Not Stated

[30] Learned counsel for the defendant referred to O. 83 r. 3(3)(c) RHC 1980 which provides that the chargee must state "the amount of any interest or instalments in arrear at the date of issue of the originating summons and at the date of the affidavit." It was submitted that in the plaintiff's affidavits (encl. 11, 12 and 19) the particulars of interest in arrear as at the date of the affidavit is omitted. It was also submitted that the plaintiff's affidavit (encl. 3) is also tainted with this deficiency. Accordingly, learned counsel for the defendant argued that the plaintiff has failed to satisfy the mandatory requirement to provide the particulars prescribed in O. 83 r. 3(3). (see *Perwira Habib Bank (supra)*) In support thereof, learned counsel cited the Court of Appeal decision in *Diamond Peak Sdn Bhd v. United Merchant Finance Bhd* [2003] 2 CLJ 8. In this case the chargor's affidavit omitted to state the position of the amount owing and the arrear in interest as at the date of the OS and the affidavit, as required by para. 6 read with para (3)(c) of O. 83 r. 3(3) RHC. The Court of Appeal held that the said omission amounted to a failure on the part of the chargor to provide the statutory particulars required under O. 83 r. 3 RHC which were mandatory. This constituted a ground for setting aside the order for sale.

[31] In reply learned counsel for the plaintiff submitted that the interest in arrears as at 19 July 2005 has been furnished in the plaintiff's supplementary affidavit including the plaintiff's affidavit (9) (encl. 27) affirmed on 26 October 2007. The plaintiff's argument is flawed because the interest in arrear as stated in the plaintiff's

affidavit (9) is as at (i) the date of the OS and (ii) 23 November 2007. The date 23 November 2007 is not in fact the date of the affidavit in question. The plaintiff's failure to provide the interest in arrear as at the date of the plaintiff's affidavit is in breach of the mandatory requirement of O. 83 r. 3(3)(c) RHC.

Notice Of Variation Of Base Lending Rate ('BLR') Not Exhibited

[32] Learned counsel also submitted that the plaintiff had failed to exhibit any notice of variation to the BLR in accordance with the Facilities Agreement. The notices were only advertised in local newspapers relating to the BLR effective 27 May 2003 expressed to be 6% and subsequently with effect from 28 December 2001 at 6.4%. No notices relating to the variation in the BLR from 6.4% to 6.5% per annum and thereafter to 6.75% per annum were exhibited by the plaintiff. These give rise to doubts as to whether the amounts said to be owing as at the order for sale required under s. 257 NLC are correct. Accordingly, it was argued that the plaintiff have failed to prove that the amounts said to be owing as at the date of the order for sale are due and owing.

[33] In reply learned counsel for the plaintiff submitted that pursuant to section 7.06 of the Facility Agreement, the variation to the BLR may be effected by publishing such variation in a newspaper of the plaintiff's choice and that such variation shall take effect from the date specified in such notice. It is, however, plain from a reading of section 7.06 of the Facility Agreement that the plaintiff was within its rights to advertise the variation to the BLR in the manner that it did. Accordingly, the defendant's contention on this issue is without merit.

[34] For the reasons adumbrated above, it is this court's findings that the chargor has adduced facts that establish cause to the contrary in the sense as laid down by the Federal Court in *Low Lee Lian*. In the premises, the plaintiffs OS is dismissed with costs.